UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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EZRIEL RAPAPORT, as Trustee of the RAPAPORT 2006 GRANTOR TRUST, Plaintiff, vs. AVI SOFFER, an individual; DOES 1 through 5 and ROE BUSINESS ENTITIES 1 through 5 inclusive, Defendants.	2:10-cv-935-MMD-RJJ Consolidated with: 2:12-cv-57 **ORDER**

This matter came before the Court for a hearing on November 29, 2012. The hearing was continued on December 13, 2012, and then December 14, 2012. At issue are Plaintiff's Motion for Protective Order (#73) and Sanctions (#74). The Court has considered the Plaintiff's Motion as well as Defendant's Opposition (#78). The Court has also considered the arguments and representations presented at the hearing.

BACKGROUND

The present motion is one of a series of discovery disputes considered by the Court during the hearing that spanned November 29, 2012, December 13 and 14, 2012. At issue here are the discovery requests served on the Plaintiff by the Defendant. Those requests entail 843 separate discovery requests for admission, interrogatories, and requests for production of documents served on July 31, 2012.

Written Discovery Requests, attached as Exhibits 1-9 to Motion for Protective Order (#73).

DISCUSSION

The last day to serve written discovery in this case was July 31, 2012. On that date, Defendant Avi Soffer served the Plaintiff Ezriel Rapaport, the Rapaport Trust, and Martin Rapaport, (collectively "Rapaport") with nine sets of written discovery. Responses were due August 31, 2012. Rapaport objected to the discovery requests and seeks a protective order from this court. Soffer, in his response, seeks an order from the court to compel responses. Response and Request for Order to Compel (#78).

I. Attempt to Meet and Confer

Rapaport's Counsel, Mario Lovato, asserts that he attempted to meet and confer. Lovato notes that he made numerous telephone calls and left messages, but received no response. Motion for Protective Order (#73) at 3. Additionally, the lead counsel on Soffer's case was changing so frequently, it became "impossible to further confer with the attorney handling the case for the past several months." *Id*.

Indeed, even the Court struggled to determine who was handling Soffer's case. At the hearing on November 29, 2012, Guiness Ohazuruike, Esq., represented Soffer. However, at the hearing, he admitted to having limited knowledge of motions at issue. Ohazuruike was unfamiliar with why certain motions were filed, the details of the motions, what prior communications occurred between Soffer's prior attorneys and Lovato, and other relevant information the Court needed in order for the hearing to move forward.

Ohazuruike informed the Court that he has been assigned to Soffer's case after most of the events leading to the present dispute had already occurred. Additionally, he was given the case the same week he was interviewed and hired, which was sometime earlier this year. Accordingly, in order to hear from someone who was more familiar with the case, the Court continued the hearing to December 13, 2012, and ordered Efrem Rosenfeld, Esq., who was present for Soffer's deposition, Ohazuruike, and Avi Soffer to all be present for the continued hearing. Rosenfeld, Ohazuruike, and Soffer all attended the December 13, 2012, hearing. Minutes of Proceeding (#85). The hearing did not conclude on December 13, 2012, and was

continued again to December 14, 2012. *Id*. Rosenfeld, Ohazuruike, and Soffer were all present for the December 14, 2012, hearing as well. Minutes of Proceeding (#86).

At the hearing, Rosenfeld explained that a number of attorneys previously working on the case were no longer with his firm. He also stated than no one from his firm informed Lovato of this, nor did anyone inform Lovato who to contact about this case. Instead, Lovato did not know Ohazuruike was working on the case until Ohazuruike called to notify him that the firm would be filing the Motion to Deem Admissions (#30).

Under Fed. R. Civ. P.. 37(a)(2)(B) a "party bringing a motion to compel discovery must include with the motion a certification that the movant has in good faith conferred or attempted to confer with the non-responsive party." Similarly, Local Rule 26-7(b) provides that "[d]iscovery motions will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have not been able to resolve the matter without Court action." LR 26-7.

Here, Lovato has made a good faith effort to meet an confer. Although the parties never actually met or conferred, it was not due to a lack of effort on the part of Lovato. Soffer's Counsel's failed to inform Lovato about changes of attorneys, failed to return calls, and failed to respond generally to Lovato's attempts to meet and confer. Thus, Lovato has satisfied the meet and confer requirement for bringing this motion.

II. Analysis

Rule 26© confers broad discretion of the trial court to decide when a protective order is appropriate as well as what degree of protection is required. In *Seattle Times Co. v. Rhinehard*, 467 U.S. 20 (1984), the United States Supreme Court recognized that District Courts have substantial discretion to issue protective orders. Rule 26© provides as follows:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery . . .

Fed. R. Civ. P. 26 ©.

Here, the Plaintiff asserts that a protective order is appropriate because the 843 discovery

requests are harassing due to their large volume, duplicative, and not relevant to the case.

A. Volume of the Requests

Soffer's counsel did not serve any written discovery requests until the last day discovery requests could be served, at which time Soffer served 843 requests. Lovato calculated that responding to all the requests would require at least 350 pages. Additionally, the requests were propounded after all the alleged principalis for the Plaintiff were fully deposed. In this context, the Plaintiff argues, the 843 discovery requests were designed to harass and impose unnecessary costs on the Plaintiff. Motion for Protective Order (#73) at 5, lines 20-24.

In response, Soffer argues, under the Fed. R. Civ. P.. 34, there is no limit to the number of requests for production of documents that a party can propound. Response to Motion for Protective Order (#78) at 8, lines 20-22. However, at the hearing, when questioned about the volume of the requests, Soffer's counsel acknowledged that 843 was an unusually large number of requests and that they had never served nearly that many requests at once, let alone on the last day to serve discovery. Further, Soffer's counsel agreed that the requests likely could have been drastically condensed and that he did not need answers to all 843 requests.

Also at the hearing, in defense of the number of requests, Soffer's counsel claimed that the number of requests varies by case and that this case justified the 843 requests. Soffer's counsel repeatedly asserted that this is a very complex case and thus the 843 requests should be considered appropriate. Lovato on the other hand asserts that this is not a complex case. Motion for Protective Order (#73) at 5, lines 20-24.

The Court, without speaking to the actual complexity of the case, finds that the alleged complexity does not justify the excessive number of requests. Soffer's counsel has not treated this case as though it is complex and thus cannot rely on complexity as an excuse. If Soffer's counsel actually believed this was a complex case, the firm would not have handed the entire case to an attorney new to the firm, Ohazuruike, to handle alone on his first day of work. Further, Soffer's counsel would have served more than one set of written discovery and many of those requests would have been served earlier in the discovery period.

Both parties acknowledge that the volume of the requests was excessive and the Court

views it no differently. Based on the briefing and the parties representations to the Court, the Court finds that the 843 requests were designed to harass and burden the Plaintiff.

B. Duplicative Discovery

Three of the nine sets of written discovery were served on the "Person Most Knowledgeable" of the Plaintiff Trust. However, the exact same discovery was also served on Ezriel Rapaport as trustee of the trust. Thus, the discovery was duplicative and served no purpose.

Further, the terminology of "person most knowledgeable" has no application outside the context of a deposition of an organizational defendant. *See* Fed. R. Civ. P.. 30(b)(6). Thus, these requests are completely nonsensical and do not require a response.

Finally, in addition to serving the exact same set requests twice to the same person, many of the requests within each set were also duplicative. For example:

> REQUEST NO. 7:
> Admit that You were not qualified to be a Board Member of the Board of Directors of the Watch Dealers Network in 2008.
>
> REQUEST NO. 62:
> Admit that You were not qualified to sit on the Board of Directors for the Watch Dealers Network.
>
> REQUEST NO. 89:
> Admit that You did not adequately fulfill Your duties as a Board Member of the Watch Dealers Network.

These requests are clearly requesting the same information. They also happen to be harassing in nature.

C. Relevancy

In addition to being unduly burdensome, harassing, and duplicative, many of Soffer's requests are not reasonably likely to lead to the discovery of admissible or relevant evidence. For example:

> REQUEST NO. 9:
> Admit that You currently set the prices for diamonds.
>
> REQUEST NO. 11:
> Admit that The Rapaport Group and/or its affiliated entities currently sets the prices for diamonds.

This case concerns WDN. The price of diamonds and Rapaport's involvement in setting the price of diamonds does not appear to be relevant to the online luxury watch business. If there is any relevance, Soffer has failed to explain to the Court or Rapaport what that relevance is.

Therefore, the 843 discovery requests were excessive in number, often duplicative, and largely not relevant to the case. By serving such discovery requests on the last day to serve discovery, the Defendant was clearly attempting to annoy, harass, and create an undue burden and expense on Rapaport. Accordingly, a protective order is appropriate and the Plaintiff does not have to respond further to the 843 requests.

III. Sanctions

In addition to the above discovery abuse, the Defendant also made an intentional misrepresentation to the Court. Concerning Requests 7, 62, and 89, the Defendant stated "the issue here is a total failure and refusal . . . to respond to written discovery requests . . " Response to Motion for Protective Order (#78) at 6, lines 16-18. This is a blatant misrepresentation. Rapaport's Counsel did respond to all the requests with objections. See Responses to Requests for Admission, attached as Exhibits 2, 3, and 4 to Response to Motion to Deem Admissions (#30). Additionally, this is the second instance in which Soffer's counsel has made this blatant misrepresentation to the Court. See Motion to Deem Admissions (#30) at 3, lines 11-12.

In response, Rapaport has requested sanctions. Motion for Protective Order (#73) at 10, lines 5-9.

First, concerning the intentional misrepresentation to the Court, attorneys' fees and costs may be awarded where a party has acted in bad faith, vexatiously, or for oppressive reasons. See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), *Hutto v. Finney*, 437 U.S. 678 (1978); *United States v. Blodgett*, 709 F.2d 608 (9th Cir. 1983).

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. A court weighing sanctions for discovery abuses may consider a party's conduct as a whole throughout the discovery process. *Adriana Int'l Corp. v. Thoeren*, 913 F.2d

1406, 1412 (9th Cir. 1990).

Here, Soffer's counsel was aware that responses had been served and nevertheless represented to the Court, twice, that responses had not been served. This is bad faith. Additionally, Soffer's counsel had an opportunity to address this intentional falsehood at the hearing, but provided no explanation. This is a blatant showing of bad faith, and sanctions are appropriate.

Second, concerning the abusive discovery requests, under Fed. R. Civ. P.. 37(a)(5)(A), once the Court grants a motion for failure to cooperate in discovery, the Court must, "after giving an opportunity to be heard, require . . . the party or the attorney advising the conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." However, such an award is not appropriate if: "(I) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's non-disclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." *Id*.

Here, the Court held a hearing on December 27, 2012, in order to give the Defendant an opportunity to be heard. At that hearing, the Defendant failed to explain why sanctions are not appropriate. First, the Plaintiff made a good faith attempt to meet and confer about this dispute. Second, the only justification for the abusive requests is that they were "procedurally proper." Although it is correct that the federal rules do not limit the number of requests a party can serve, the rules do prohibit overly burdensome and harassing requests. Finally, the Court specifically asked Soffer's counsel, Rosenfeld, whether there was any reason an award would be unjust. Rosenfeld's only response was that the amount of costs and fees Lovato provided was "shocking" and he had never seen such a high amount. The mere fact that the amount requested is large, is not an explanation for why an award would be unjust. Accordingly, sanctions under Rule 37 are appropriate. The amount of such fees and costs will be addressed in a separate order.

CONCLUSION

Based on the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's Motion for Protective Order (#73) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Sanctions (#74) is **GRANTED.**

DATED this 31st day of December, 2012

ROBERT J. JOHNSTON
United States Magistrate Judge